91-1413

NO. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

EDDIE THOMPSON, JR.,
Petitioner-Plaintiff,

vs.

CITY OF COVINGTION, JOSEPH CONDIT,
HOWARD HODGE,
Respondents-Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED

(1) Whether an action, brought in Kentucky for breach of contract pursuant to Civil Rights Statutes (42 USC §§ 1982, 1983, etc.) is subject to Kentucky's one year Statute of Limitations for an action for an injury to the person of the plaintiff? (KRS 413.140(1)(a). Page 21

(2) Under Kentucky law, must a defendant plead a statute of limitations, in an action based upon a written contract, in order to benefit from application of the statute? Page 24

(3) Based upon the uncontroverted facts in the record, is Petitioner entitled to summary judgment, as a matter of law? Page 26

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PETITION FOR A WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

Petitioner, Eddie Thompson, Jr., (hereinafter Petitioner) respectfully prays that a Writ of Certiorari issue to review the Judgment of United States Court of Appeals entered on October 9, 1991, and Annexed as Appendix Page 21a (hereinafter App. P 21a) Petition for Rehearing denied on November 29, 1991. (App. P 23a)

OPINION BELOW

On December 18, 1990, the District Court entered its opinion, order and judgment, sua sponte dismissing petitioner's complaint, as barred by Kentucky statute of limitations (K.R.S. 413.140(1)(a). (NR 10, 11, App. P 7a, 9a)

On March 4, 1991, the District Court entered an order:

> (1) deny(ing) motion of plaintiff to vacate judgment of December 18, 1990; (s) grant(ing) plaintiff's motion to make findings of facts; (3) deny(ing) plaintiff's motion for a hearing; (4) deny(ing) plaintiff's motion to strike, defendants' motions to dismiss, as insufficient as a matter of law; (5) deny(ing) plaintiff's motion that facts in request for admissions be taken as established; and (6) deny(ing) Condit's motion for a protective order as moot. (NR 21, App. P 10a)

On March 4, 1991, the District Court entered a revised opinion and order dismissing petitioner's federal claims based on statute of limitation. (NR 22, App. P 12a)

On June 6, 1991, the District Court entered an order:

> (1) denying plaintiff's motion for reconsideration as moot.
>
> (2) denying plaintiff's motion for Rule 11 sanctions against defendants for their failure to properly answer request for admission.
>
> (3) stating: No trial or hearing[1] was held in this Court; there is no shortcoming in the record for which F.R.A.P. 10(c) can provide a remedy.
>
> (4) stating (Plaintiff's) appears to be sincere in his belief that the law affords him relief for his unsuccessful real estate transactions in the 1970's. However, he has fully litigated[2] these issues and is draining the resources of the Court and the parties named as defendants . . . Accordingly, the Court orders that plaintiff

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[1] District court acknowledges due process is denied.

[2] This is contrary to the Court's opinion and order of December 18, 1990, (NR 10 & 11, App. P 7a, 9a) and the Court's revised opinion and order of March 4, 1991. (NR 22, App. P 12a). Nowhere in the Court's opinion is there a finding, "plaintiff has previously fully litigated any issues involved in this case."

> may not file any further pleadings or new actions dealing with issues raised in this (action) without leave of this Court. (NR 33, App. P 17a)

On July 23, 1991, the District Court declined to rule on the motion for leave to amend notice of appeal. (NR 35, App. P 20a)

JURISDICTION

Jurisdiction of the District Court was invoked pursuant to 28 USC § 1343, 42 USC § 1982, and 42 USC § 1983. The Sixth Circuit had jurisdiction pursuant to 28 USC § 1291. Jurisdiction is invoked here, pursuant to 28 USC § 1254(1), (2).

Decisions of this court sustaining jurisdiction.

Campbell v. *Holt*, 115 US 620 (1885)
Carter v. *Stanton*, 405 US 669, 31 L Ed 2d 569, 92 S Ct 1232, 92 S Ct 1232 (1972)
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Townsend v. *Jemison*, 13 L Ed 194, 9 Howell 407
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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONSTITUTION

FIRST AMENDMENT — Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abriding the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FIFTH AMENDMENT — No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FOURTEENTH AMENDMENT, section 1 — All perons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL STATUTES

28 USC 1343 — The District Court shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any deprive or privilege of a

citizen of the United States, by any act done in furtherance of any conspiracy mentioned in Section 1985 of Title 42 [42 USCS § 1985];

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrong mentioned in Section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State Law, Statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

42 USC § 1982 — All citizens of the United States shall have the same rights, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property.

42 USC § 1983 — Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof or the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

FEDERAL RULES

FRCP, Rule 8(b) — A party shall state in short and plain terms his defense to each claim asserted and shall admit or deny the averment upon which the adverse party relies. If he is without knowledge he shall so state and this has the effect

of a denial. Denial shall fairly meet the substance of averments denied . . .

FRCP, Rule 8(c) — In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption and risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of fraud, statute of limitations and any other matter constituting an avoidance or affirmative defense . . .

FRCP, Rule 8(d) — Averments in a pleading to which a responsive pleading is required, other than the amount of damages, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsible pleading is required or permitted shall be taken as denied or avoid.

FRCP, Rule 12(a) — A defendant shall serve his answer within 20 days after the service of the summons and complaint upon him . . .

FRCP, Rule 12(b) — Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader, be made by motion:

(6) failure to state a claim upon which relief can be granted,

If, on a motion asserting the defense number (6) to dismiss for failure of pleading to state a claim upon which relief can be granted, matter outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such motion by Rule 56.

FRCP, Rule 12(c) — After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judg-

ment on the pleadings, matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such motion by Rule 56.

FRCP, Rule 12(d) — The defenses specially enumerated (1)-(7) in subdivision (b) of this rule, whether made in pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the Court orders that the hearing and determination thereof be deferred until the trial.

FRCP, Rule 12(f) — Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the Court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

FRCP, Rule 36(a) — A party may serve upon any other party a written request for the admission, for the purposes of the purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of facts or of the application of law to fact, including the genuineness of any documents described in the request . . . Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request . . .

FRCP, Rule 36(b) — Any matter admitted under this Rule is conclusively established unless the Court on motion permits withdrawal or amendment of the admission.

FRCP, Rule 56(c) — The motion shall be served at least 10 days before the time fixed for a hearing. The adverse party prior to the day of the hearing may serve opposing affidavits.

The judgment sought shall be rendered forthwith if the pleadings, dispositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

FR Evid., Rule 201(d) — A Court shall take judicial notice if requested by a party and supplied with the necessary information.

Rule 201(e) — A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter notice. In the absence of prior notification, the request may be made after judicial notice has been taken.

Rule 201(f) — Judicial notice may be taken at any stage of the proceeding.

JOINT LOCAL RULES

LR 6(a) — Motions. All motions shall state precisely the relief requested. Except for routine motions, such as for extensions of time, each motion shall be accompanied by supporting memorandum which complies with the provisions of this RULE. Failure to do so may be grounds for denying the motion.

LR 6(b)(1)(A) — Opposing Memorandum. An opposing memorandum must be filed within fifteen (15) days from the date of service of the motion which may be extended for no more than thirty (30) additional days by written stipulation filed with the Court unless the stipulation would extend the time beyond a deadline established by the Court. Failure to file an opposing memorandum may be grounds for granting the motion.

LR 6(e) — Hearings on Motions. A party may request a hearing on a motion by filing a motion for oral arguments which set forth the reasons why counsel believes that argument may assist the Court in ruling on the motion. If a hearing is not requested, or if requested but not granted, a motion shall be submitted to the Court for decision after the reply memorandum is filed, or the time for filing such a memorandum has expired.

KENTUCKY STATUTES

KRS 413.090 — Except as provided in KRS 413.110, 413.200, 413.210, 413.220, 413.230, 413.240, the following actions shall be commenced within fifteen (15) years after the cause of action first accrued: (2) An action upon a recognizance, bond, or written contract.

KRS 413.120 — The following actions shall be commenced within (5) years after the cause of action accrued: (6) An action for an injury to the rights of the plaintiff, not arising on contract and not otherwise enumerated.

KRS 413.140(1) — The following action shall be commenced within one (1) year after the cause of action accrued: (a) An action for an injury to the person of the plaintiff, or of her husband, his wife, child, ward, apprentice or servant. Baldwin Annotated (1990)

STATEMENT OF THE CASE

In summary, petitioner has alleged, inter alia, that the City of Covington, and its officials, conspired against him on the basis of his race in enacting a City ordinance,[3] to avoid paying rental assistance due on written contracts[4] between petitioner and the City. (NR 1, App. P 1a-6a)

After failing to obtain a decision on the merits in prior suits in Federal and State Court, petitioner filed the instant action on September 14, 1990; seeking money damages to compensate him for the deprivation of his civil rights guaranteed by the 5th, 13th and 14th Amendments to the U.S. Constitution. Petitioner also sought a trial by jury. (Seventh Amendment, U.S. Constitution) (NR 1)

On October 9, 1990, counsel for defendants, Hodge and Condit, filed a pretrial motion[5] to dismiss, on the grounds that the statute of limitations applicable[6] to the civil rights allegations of the complaint barred recovery and further that the complaint was barred by the doctrine of res judicata. (NR 2)

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[3] An ordinance, enacted on February 5, 1991, requiring a fire escape on a two-family dwelling. (NR 1, Ex. D, App. P 3a)

[4] First contract was signed on December 4, 1975. City changed date to June 10, 1976. (NR 1, Ex. A, App. P 2a). Second contract was signed on May 10, 1977 (NR 1, Ex. E, App. P 4a) and was in effect for the duration of the tenancy, about June 1981.

[5] Petitoner filed responses, pointing out that claims were based upon a written contract, defendants were not proceeding in good faith, and the City was in default. (NR 4 & 8)

[6] Defendants did not plead any statute of limitation, (FRCP R. 8(c) and LR 8(a)) but, misrepresented (1) alleged acts of race discrimination occurr(ing) at the latest, in the 1970's; (2) Under *Wilson*, *supra*, petitioner had one year after the alleged acts of discrimination to file suit; (3) More than a decade (10 years) had passed; (4) identical civil rights actions were filed in Federal and State Courts barring recovery in this action; (5) that 20 years had passed. (1970's to 1990's). These representations made in spite of the fact that defendants had asked the District Court to abstain in 78-05, because of the contract.

On October 19, 1990, counsel for defendant, City, filed a motion[5] to dismiss, similar to that filed on behalf of defendants, Hodge and Condit. (NR 3).

On December 3, 1990, petitioner filed a motion to strike[7] defendants' motion to dismiss, as insufficient as a matter of law. (NR 9)

On December 3, 1990, petitioner filed Request for Admissions[8] upon defendant, Condit. (NR 14)

On December 18, 1990, the District Court sua sponte dismissed petitioner's 1983 claims, purportedly, on Statute of Limitations grounds.[9] The District Court made no reference to the appropriate State Statute of Limitations (KRS 413.090(2)) as required by this court. (NR 10, 11 App. P 7a, 9a). The facts cited in the Court's opinion were totally unrelated to the complaint filed by petitioner in this case.

On December 29, 1990, (NR 12) petitioner filed a motion to:

(1) Vacate Judgment of December 18, 1990.
(2) Grant plaintiff's motion to strike.
(3) Take judicial notice of prior conference and proceedings.
(4) Make findings of facts.

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[7] The motion was in fact a motion for judgment on the pleadings and/or summary judgment. See *Lehmann Trading* v. *J. H. Stolow, Inc.*, 184 F Supp 21. No defendants filed a response.

[8] Mr. Condit failed to answer the request for admissions or set forth reasons why he could not admit or deny.

[9] No hearing was held and nowhere in the record can it be shown where defendants[10] plead or claim that KRS 413.140(1)(a) was applicable to the facts of this case.

[10] Defendants admit 15 year statute is applicable when they fail to respond to Motion to Strike Motion to Dismiss as Insufficient, as a matter of law.

On January 4, 1991, petitioner moved the District Court for a hearing[11] on pending motions (NR 13)

On January 6, 1991, petitioner filed a response to defendant Condit's motion for a protective order.[12]

On March 4, 1991, the District Court entered an order denying all pending motions, except motion to make findings of facts. (NR 21, App. P 10a)

On March 4, 1991, the District Court entered a revised opinion[13] and order[14]. (NR 22, App. P 12a)

On March 14 1991, petitioner filed a motion and affidavit for reconsideration and a motion for sanctions against defendants. (NR 23)

On April 1, 1991, petitioner filed a notice of appeal. (NR 24)

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[11] Purpose of hearing was to ensure due process and equal protection of the law. 5th and 14th Amends. U.S. Const.

[12] Petitioner reminded the District Court that the right to trial by jury is not lost as to legal issue merely because issues are incidental to equitable issues. Any factual issues concerning Statute of Limitations, should be made by the jury rendering a special verdict. (FRCP 49(a))

[13] The Court found: "the basis of litigation was a written contract between plaintiff and the City, and the fifteen year Statute of Limitations governing contracts should apply." "Plaintiff charges that defendants deprived him of his civil rights by manipulating the conditions under which an apartment . . . was leased to the City for participation in a subsidized housing program. The alleged manipulation, resulting in withholding of rent payments on the property, occurred between 1975 and 1977."[4]

[14] After finding the above stated facts, the District Court concluded: However,[15] plaintiff filed suit in Federal Court alleging violation of 42 USC § 1983. The applicable statute of limitation is one year. *Collard* v. *Kentucky Bd. of Nursing*, 896 F 2d 179, 182 (6th Cir. 1990). Consequently, the action is barred by the Statute.

[15] In other words, under State law, the 15 year statute of limitations was applicable to petitioner's contract claims. But, since petitioner is merely seeking remedy for violation of his Civil Rights rights, petitioner is limited to only one year.

On April 9, 1991, pursuant to F.R.A.P. 10(c), petitioner filed a statement[16] of evidence and/or proceeding to show how the questions for appeal arose, as there was no hearing or transcript of evidence available. (NR 25)

On April 18, 991, the District Court entered an order that defendants file a response to petitioner's motion for Rule 11 sanctions[17] against the defendants. (NR 26)

On June 6, 1991, the District Court entered an order denying petitioner any relief.[18] (NR 33, App. P 17a)

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[16] Defendants have no basis in fact or law to challenge petitioner's Civil Rights claims, or findings by the District Court.

[17] Defendants have not denied that they made misrepresentations of facts and law in the District Court even though the District Court ordered defendant to specifically answer that charge. (Affidavit, NR 23, App. P 14a)

[18] The District Court's order is riddled with contradictions stating, inter alia, that: (4) "(petitioner) appears to be sincere in his belief that the law affords him relief[19] for (violations of his civil rights). However, he has fully litigated these issues . . . Accordingly, the Court orders that plaintiff may not file any further or new actions dealing with the issues raised in (this) action without leave of Court."

[19] Once the District Court concluded petitioners' "federal rights had been invaded" and petitioner had fully litigated issues"), Court was required to fashion a remedy, so as to grant petitioner the necessary relief. It is well settled, "Where federally protected rights have been invaded, it has been the rule from the beginning that Courts will be alert to adjust their remedies so as to grant the necessary relief." *Bivens, supra*, 403 US 388, 392

STATEMENT OF FACTS

The facts of the case are not in dispute. The record, i.e. (a) verified pleadings, (NR 1, App. P 1a) (b) prior pretrial conference and proceedings annexed to motion to vacate filed December 28, 1990, (NR 12) (c) admissions of defendants on file, (NR 14) (d) affidavit of plaintiff, annexed to motion for sanctions, (NR 23, App. P 14a) (e) District Court's revised opinion and order of March 4, 1991, (NR 22, App. P 12a), and (f) the unpublished Order of Court of Appeals affirming, (App. P 21a) all show facially that: (1) the conduct at issue was under color of law; (2) the conduct caused a deprivation of constitutional rights; (3) the deprivation occurred without due process or equal protection of the law; (4) the invalid ordinance was tantamount to ex post facto legislation; and (5) there was no genuine issue as to any material fact. Under these circumstances, petitioner is entitled to a summary judgment as a matter of law.

This case involves no elements of personal injuries that could be appropriately classified under KRS 413.140(1)(a)[20]. To the contrary, defendants admit that this is an action to enfore petitioner's Constitutional and Statutory Rights that were denied when the City of Covington made a racially motivated decision to enact an ordinance. The ordinance was used soley to abrogate the City's contractual obligation to pay rent due and owing under a written contract,[21] with petitioner. A sum due and owing, to which petitioner is due a judgment quantum meruit.

When defendants admitted that the fifteen (15) year statute of limitations was applicable to the instant action; the District Court abused its discretion, when it sua sponte dismissed petitioner's claims, as if based upon an injury to the person of plaintiff.

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[20] An action for an injury to the person of plaintiff, or of her husband, his wife, ward, apprentice or servant.

[21] Governed by the fifteen year statute.

In briefs to the Sixth Circuit, counsels for the defendants, (1) admitted all allegations of the complaint and waived oral argument,[22] so as to delay and/or evade the issues before that Court.

The Court of Appeal's decision affirming is clearly erroneous. The failure to review the case de novo is plain error, resulting in a denial of liberty and property, without due process or equal protection of the law, in contravention of Fifth and Fourteenth Amendments, U.S. Constitution. The decision also effectively denied petitioner's Constitutional right to petition the government for a redress of grievances as guaranteed by the First Amendment, U.S. Constitution.

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[22] Since Counsel for defendants had not argued, that KRS 413.140(1)(a) was the applicable statute or that *Collard*,[23] *supra*, was applicable to the facts of this case, in the District Court, they could and did not make that argument in the Sixth Circuit.

[23] *Collard*, *supra*, was not a civil rights action as no action was taken under color of law.

REASONS FOR GRANTING THE WRIT

From the undisputed facts on the face of the record, it is clear that the City of Covington and its officials made a conscientious racially motivated decision to enact a City ordinance, solely to abrogate the City's contractual obligation to pay rent due under a written contract between petitioner and the City.

It is well settled that:

> where federally protected rights have been invaded, it has been the rule from the beginning that Courts will be alert to adjust their remedies so as to grant the necessary relief. *Bell* v. *Hood*, 327 US 678, 684 (1946)

While the U.S. Supreme Court ordinarily defers to lower Court's construction of State statutes[24] it does not invariably do so, particularly when the lower Courts have fallen into plain error. *Frisby* v. *Schultz*, 487 US 474, 483

When legal and equitable claims are joined in the same action, "the right to a jury trial on the legal claim, including all issues common to both claims, remain intact." *Lytle* v. *Household Manufacturing*, 108 L Ed 504 (1990)

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[24] Traditionally, under Kentucky Statutory law (KRS 413.140), action for injuries to the person referred to those cases where the personal injury, such as assault and battery, physical injuries to the body and the like, is the gist of the action. *Restlawn Memorial Cemetery* v. *Trammell*, 730 S.W. 2d 908 (KYCA 1941). Also see *Troxell* v. *Trammell*, 730 S.W. 2d 525 (KYSC 1987). In 1984, the Kentucky Supreme Court concluded that Kentucky should recognize the tort of intentional infliction of emotional distress and that the applicable limitations should be five years as provided in section 413.120(6).[25] *Craft* v. *Rice*, 671 S.W. 2d 247 (1987)

[25] An action for an injury to the right of the plaintiff, not arising on a contract and not otherwise enumerated,[26] is five (5) years. (KRS 413.020(6))

[26] An action upon a written contract is fifteen (15) years. (KRS 413.020(2))

Federal Courts of Appeals are required to review de novo, Federal District Courts' determination of state law. *Salve Regina College* v. *Russell*, 113 L Ed 2d 190, 198

> Independent appellate review of legal issues best serve the dual goal of doctrinal cohorence and economy of judicial administration . . . As questions of law become the focus of appellate review, it can be expected that the parties' briefs will be refined to bring to bear on the legal issues more information and more comprehensive analysis than was provided for the District Judge . . . Independent appellate review necessarily entails a careful consideration of the District Court's legal analysis, and an efficient and sensitive Appellate Court at least will naturally consider this analysis in undertaing its review, . . . Any expretise possessed by the District Court will inform the structure and content of its conclusions of law and thereby become evident to the reviewing Court. If the Court of Appeals finds that the District Court's analytical sophistication and research have exhausted the State-Law inquiry, little more need be said in the appellate opinion. Independent review, however, does not admit of unreflective reliance on a lower court's inarticulable intuitions. Thus, an appropriately respectful application of de novo review should encourage a District Court to explicate with the basis for its legal conclusions. See FRCP Rule 52(a) ("requiring the District Court to state separately its conclusions of law.") . . . In addition, it is "especially common" for issues involving supervision of litigation to be reviewed for abuse of discretion. See *Pierce* v. *Underwood*, 487 US 552, 558, n 1, . . . ("The District Court is better situated than the Court of Appeals to marshall the pertinent facts and apply the fact-dependent legal standard mandated by Rule 11") Pierce supra at 562 . . . Nothing about the exercise of (Federal) jurisdiction alters these functional components of deci-

sionmaking or otherwise warrants departure from a rule of independent appellate review. Actually, appellate deference to the District Court's determination of State Law is inconsistent with the principles underlying this Court's decision in *Erie*. The twin aims of the Erie Doctrine — "discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna* v. *Plumer*, 386 US 460, 468, — are components of the goal of doctrinal coherence advanced by independent appellate review . . . Moreover, by denying access to meaningful review of State-Law claims, appellate courts that defer to the District Courts' State-Law determinations create a dual system of enforcement of State-Created rights, in which the substantive rule applied to a dispute may depend on the choice of forum. Id. at 199. Cf. *Erie*, 304 US, at 74-75, 82 S Ct 817, ("[The rule of *Swift* v. *Tyson*, 16 Pet 1, 10 L Ed 865 (1842)] made rights enjoyed under the unwritten 'general law' vary according to whether enforcement was sought in the State or in the Federal court"). Neither of these results, unavoidable in the absence of independent appellate review, can be reconciled to the commands of Erie. [In *Bernhardt* v. *Polygraphic Co.*, 350 US 198, this court remanded the case to the District Court for application of State Law. (This) Court noted, however that the law of the State was firmly settled, and emphasized: "Were the question in doubt or deserving of further convass, we would of course remand to the Court of Appeals to pass on this question of (State) Law." Id., at 205,] . . . 113 L Ed 2d 200. When de novo review is compelled, no form of appellate deference is acceptable. Id., at 202.

It is well settled: To sustain a § 1983 claim,[27] plaintiff need

[27] In essence, § 1983 creates a cause of action where there has been injury, under color of state law, to the person or to the constitutional or

only to show:[28] (1) the conduct at issue was under color of law; (2) the conduct caused a deprivation of constitutional rights; and (3) the deprivation occurred without due process of law. *Flagg Brothers* v. *Brooks*, 436 US 149, 155 (1978).

> A complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley* v. *Gibson*, 355 US 41, 45 and;
>
> Summary Judgment against a plaintiff will be vacated, and the cause remanded, where the Federal District Court's order is opaque and unilluminating as to either the relevant facts or law with respect to the merits of the plaintiff's claim. *Carter* v. *Stanton*, 405 US 669, 671.

Defendants admitted that their motions to dismiss are insufficient, as a matter of law, by failing to respond to peti-

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federal statutory rights which emanate from or are guaranteed to the person. In the broad sense, every cause of action under § 1983 which is well-founded, results from 'personal injury.' *Wilson* v. *Garcia*, 471 US 261, 278, 85 L Ed 2d 254, 105 S Ct 1938 (1985). In *Wilson* this Court concluded,based upon the legislative history of § 1983 and the wide array of claims now embraced by that provision, that § 1983 "confer(s) a general remedy for injuries to personal rights. Because § 1983 claims are best characterized as personal injury actions, the Court of Appeals correctly applied the . . . statute of limitations governing actions "for an injury to the person or reputation of any person." See *Owen*, *supra*.

[28] Petitioner[29] claims jurisdiction under 5th and 14th amendments of the US Constitution and civil rights statutes; and characterized elements of his action as based upon a written contract between petitioner and the City.

[29] Of course, (Petitioner) is absolute master of what jurisdiction he will appeal to; and if he goes to the District Court for (violations of his Civil Rights), unless the claim is frivolous or a pretense, the District Court will have jurisdiction on that ground, even though the course of . . . pleadings reveals other more serious disputes. *Healy* v. *Sea Gull Specialty Co.*, 59 L Ed 1058, 237 US 480.

tioner's motion to strike said motions to dismiss, as insufficient, as a matter of law. (NR 12) (See FRCP 8(b), (c), LR 6(b)(1)(B))

The District Court violated its own Rules (LR 6(b)(1)(A), 6(e), when the Court sua sponte dismissed petitioner's Civil Rights complaint, without a hearing.

The District Court abused its discretion when it sua sponte applied an unpleaded, inappropriate State's statute of limitations to an inapposite set of facts, and dismissed petitioner's civil rights claims. Statute of limitations is a personal defense and failure to plead statute of limitations is no defense. *Townsend* v. *Jemison*, 13 L Ed 194, 9 Howell 407

> Whoever, by virtue of public position under a state government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the state and is clothed with the state's power, his act is that of state. *Buchanan* v. *Warley*, 62 L Ed 149, 245 US 60 (1917)

THE QUESTIONS PRESENTED

(1) Whether an action, brought in Kentucky for breach of contract pursuant to Civil Rights Statutes (42 USC §§ 1982, 1983, etc.) is subject to Kentucky's one year Statute of Limitation for an action for an injury to the person of the plaintiff? (KRS 413.140(1)(a)[24]

The District Court acknowledged the existence of petitioner's contract claims, yet sua sponte, on the basis of *Collard*, *supra*, dismissed without a hearing. (NR 10, 22, App. P 7a, 12a)

On appeal, the Court of Appeals refused to review the dismissal de novo, rejected petitioner's request to be heard de novo and sua sponte affirmed the District Court.

The *Collard* Court construed (misconstrued) "personal injury" as articulated in the U.S. Supreme Court's decisions. (e.g. *Burnett*, *Goodman*, *Hardin*, *Owen*, *Wilson*) as an "action for injury to the person of plaintiff" as outlined in KRS 413.140(1)(a). The Kentucky Supreme Court has construed KRS 413.140(1)(a) as applicable only to "personal tort" cases where injury is to the person of plaintiff. See cases cited in footnote 24. Application of that statute, to violation of Civil rights, improperly narrows the U.S. Supreme Court's interpretation of personal injuries for deprivation of any right, privileges or immunities secured by U.S. Constitution and law, for purposes of section 1983 claims analysis.

In *Wilson*, this Court noted the claims brought under § 1983 include:

> "discrimination in public employment on the basis of race or the exercise of First Amendment rights, discharge or demotion without procedural due process, mistreatment of school children, deliberate indifference to the medical needs of prison inmates, the seizure of chattels without advance notice or sufficient opportunity to be heard." (footnotes omitted) *Lugar*

> v. *Edmondson Oil Co.*, 457 US 922 (1982); *Flagg Bros., Inc.*, 436 US 149; *Owen, supra*, 102 L Ed 2d 594

Many of these claims bear little if any resemblance to the common-law intentional tort. See *Felder* v. *Casey*, 101 L Ed 2d 123. Even where intent is an element of a constitutional claim or defense, the necessary intent is often different from the intent requirements of a related common-law intentional tort. e.g. *Hustler Magazine* v. *Farwell*, 99 L Ed 2d 41 (distinguishing constitutional "malice.") Given that so many claims brought under § 1983 have no precise state-law analogy applying the statute of limitations for the limited category of intentional torts would be inconsistent with § 1983's broad scope. *Owen, supra*, 102 L Ed 2d 594, 605

The (*Collard*) analogy of "injury to the person of plaintiff" also reflects a profound misunderstanding of § 1983's history.

> Section 1983 was the product of Congressional concern about the Ku Klux Klan-sponsored campaign of violence and deception in the south, which was "denying decent citizens their civil rights" *Wilson, supra*, 471 US 296; See *Briscoe* v. *LaHue*, 460 US 325. Although these violent acts often resembled the tort of assault, battery, false imprisonment, and misrepresentation, § 1983 was not directed at the perpetrators of these deeds as much as at the State officials who tolerated and condoned them. "While one of the main scourges of the evil — perhaps the leading one — was the Ku Klux Klan, the remedy created (§ 1983) was not a remedy against it or its members but against those who representing a State in some capacity, were unable or unwilling to enforce a State law." *Monroe* v. *Pape*, 365 US 167.

All persons within the jurisdiction of the United States have the same right (to lease real property and) to make and enforce contracts as is enjoyed by white citizens. *Saint Franicis College* v. *Al-Khazraji*, 481 US 604 (1987)

(This Court's) decision in *Wilson* that one "simple broad characterization" of all § 1983 actions was appropriate under § 1988 was, after all, grounded in the realization that the potential applicability of different state statutes of limitations (to the same cause of action) had bred chaos and uncertainty. Id. at 275, 85 L Ed 2d 254; See also *Burnett* v. *Gratton*, 468 US 42, 50, 82 L Ed 2d 36, 104 S Ct 2924 (1984). Courts selecting a State statute of limitations for § 1983 actions must tak(e) into account practicalities that are involved in litigating federal civil rights claims.

In *Wilson*, this Court expressly rejected the practice of drawing narrow analogies between § 1983 claims and state causes of actions, explain(ing) that the Civil Rights Act provided:

> (a) unique remedy mak(ing) it appropriate to accord the statute 'a sweep as broad as its language.' Because the § 1983 remedy is one that can 'override certain kinds of state laws.' *Monroe* v. *Pape*, 365 US 167, 173, 5 L Ed 2d 492, 81 S Ct 473 (1961), and is in all events, 'supplementary to any remedy any State might have, *McNeese* v. *Board of Education*, 373 US 668, 672, 10 L Ed 26 622, 83 S Ct 1433 (1963), it can have no precise counterpart in State law. *Monroe*, *supra*, 365 US, at 196, n. 5 (Harlan, J., concurring). Therefore, it is 'the purest coincidence,' ibid., when state statutes or the common law provide for equivalent remedies; any analogies to those causes of action are bound to be imperfect." Ibid. (footnotes omitted) *Owens* v. *Okure*, 102 L Ed 2d 594, ____ US ____, ____ S Ct ____

For the foregoing reasons, this Court should overrule *Collard* and hold KRS 413.140(1)(a) inapplicable to personal injuries for deprivation of any right, privileges or immunities secured by the U.S. Constitution and a written contract, for purposes of a section 1983 claims analysis.

(2) Under Kentucky law, must a defendant plead a statute of limitation, in an action based upon a written contract, in order to benefit from application of that statute?

It is well settled in Kentucky that a statute of limitations must be pleaded as an affirmative defense in an answer. In *Reams* v. *Laurel County*, 160 SW 2d 176, 180 (1942), the Kentucky Court of Appeals (Kentucky's highest Court at the time) held that:

> Without discussing the merit of this claim made that the action upon the written contract sued on was barred by limitations, it is sufficient answer to such contention to state that the question of limitation is not here before us, for the reason that same can not be raised by demurred, as here attempted, but must be expressly pleaded in the answer. (Also see FRCP 8(c))

Defendants have never articulated any facts or statute of limitation that would have ostensibly barred petitioner's claims. Thus, whether petitioner's claims were barred by Kentucky's statute of limitations was not present on December 18, 1990, when the District Court sua sponte dismissed petitioner's civil rights action. (NR 10, 11, App. P 7a, 9a). The District Court abused its discretion, which was plain error. The only statute of limitations applicable to making and enforcing a written contract in Kentucky is KRS 413.090(2), which provides for 15 years.

In *Hardin* v. *Straub*, 490 US 536, this Court held:

> Limitations periods in § 1983 cases are to be determined by reference to the appropriate "state statute of limitations and coordinate tolling rules," unless their full application would defeat the goals of the federal statute at issue.
>
> As to claims for violation of rights under Federal Constitutional Amendments and claims for violations of Civil Rights Act, borrowing of state limitations

> periods to determine timeliness of claims was conditioned on state limitations period being consistent with policies underlying Federal Rights of action, and applicable limitations period was that which Court of State would have used had the action been brought there. *Beard* v. *Robinson*, 563 F 2d 331

According to the view of the District Court; "(petitioner) has fully litigated (the) issues (present) here." "Petitioner appears to be sincere . . . that the law affords him relief . . ." (NR 33, App. P 17a) The Sixth Circuit did not disagree with those facts. An objection to a recovery for violation of Civil Rights cannot be raised by failure to plead facts that do not exist. That would be against public policy.

This Court reasonsed in *Campbell* v. *Holt*, 115 US 620, 625, 29 L Ed 483 (1885):

> Statute of Limitation does not destroy the right in foro conscieniae to the benefit of assumpsit, but only bars the remedy if the defendant chooses to rely on the bar. Time does not pay the debt . . . A debt barred by time is a sufficient consideration for a new assumpsit. The statute of limitation only disqualifies the plaintiff to recover a debt by suit if the defendant rely on time in his plea. It is a personal privilege, accorded by law for reasons of public expediency; and the privilege can only be asserted by plea* . . . No man promises to pay money with any view to being released from the obligation by lapse of time.* At 628 . . . We are unable to see how a man can be said to have property in the bar of the statute as a defense to pay . . . We can understand a right to enforce the payment of a lawful debt. The Constitution says no State shall pass any law impairing this obligation. But we do not understand the right to satisfy that obligation by a protracted failure to pay. We can see no right which the promisor has in the law which permits him to plead lapse of time instead of payment . . . because its effect is to make him fulfill his honest obligations.

Clearly, failure to plead any statute, barred that defense in this action. See *Oscanyan* v. *W. H. Arms Co.*, 103 US 261 (1881); and *Townsend* v. *Jemison*, 13 L Ed 194, 9 Howell 407.

(3) Based upon the uncontroverted facts in the record, is Petitioner entitled to summary judgment, as a matter of law?

Where a motion to dismiss is before the Court, the parties are entitled to a hearing[30] on the motion.[31]

> Under Rule 56(c), summary judgment is proper "if pleading, dispositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." . . . (T)he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion against a party who fails to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation there can be "no genuine issue as to

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[30] FRCP 12(d) and Evidentiary Rule 201(d), (e), (f).

[31] One of the principal purposes of summary judgment is to isolate and dispose of factually unsupported claims or defenses, and the rule should be interpreted in a way that allows it to accomplish this purpose. Party seeking summary judgment always bears the initial responsibility of informing the Court of basis for motion, identifying those portions of the pleadings, dispositions, answers to interrogatories, and admissions affidavits, if any, which demonstrate absence of any genuine issue of material fact. *Celotex*, 417 US 317

any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of his case with respect to which he had the burden of proof. "The standard for (granting summary judgment) mirrors the standard for a directed verdict under (FRCP) Rule 50(a). *Celotex Corp.* v. *Catrett*, 477 US 317, 322, 323.

CONCLUSION

From the face of the complaint, defendants' admissions [32] on file, prior proceedings, and affidavit of petitioner, it is clear that: (1) Certiorari should be granted in this important Civil Rights action; (2) petitioner is entitled to summary judgment as a matter of law; and (3) *Collard*, *supra*, should be overruled.

Equity follows the law — equity, in dealing with cases or equitable nature adopts and follows the analogies furnished by the rules of law. Black's Law Dictionary, 5th Edition.

Defendants never met their threshold responsibility[33] of informing the District Court of their basis for claiming *Collard* or that KRS 413.140(1)(a) was applicable to the facts of this case.

The errors below may not have occurred if defendants had not pretended the law supported their positions.

WHEREFORE:

Petitioner respectfully requests this Court to: (1) reverse the decision below, with direction to the District Court to enter summary judgment for petitioner; (2) order District Court to hold a hearing to determine damages; (3) order defendants to pay the reasonable costs incurred by petitioner in the prosecution of this Civil Rights action, including a reasonable attorney's fee.

Eddie Thompson Jr.

Eddie Thompson, Jr., Pro Se

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[32] *Shelton* v. *United States of America*, 346 US 270, 97 L Ed 2d 1603, 73 S Ct 1030 (1953).

[33] Litigants "may not pretend that the law favors their view and impose on the Court or their adversaries the burden of research to uncover the basis Rule." Ostrich-like tactic of pretending that potentially dispositive authority against a litigant's position does not exist is an unprofessional as it is pointless." *Mars Steel* v. *Continental*, 880 F 2d 928, 938-39

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

NO. 90-162

EDDIE THOMPSON, JR.
PLAINTIFF

vs.

CITY OF COVINGTON,
HOWARD HODGE, JOSEPH CONDIT
DEFENDANTS

COMPLAINT
(Filed September 14, 1990)

SERVE: Mr. Denny Bowman, Mr. Joseph Condit, and Mr. Howard Hodge, Coppins Bldg. 7th and Madison, Covington, Ky. 41011. Mr. Frederic Cowan, Kentucky Attorney General, Frankfort, Ky. 40601.

* * *

Jurisdiction of this court is invoked pursuant to the provisions of title 28 U.S.C. § 1343, this being a suit authorized under the Constitution, and laws of the United States. Plaintiff seeks to redress the deprivations under color of state law, statute, ordinance, regulation, custom or usage of rights, privileges and/or immunities secured by the Constitution and laws of the United States or by any other act of congress providing for equal rights of citizens. The rights herein sought to be preserved are guaranteed by the United States Constitution, thirteenth and fourteenth amendments, the fair housing

statute as authorized by 42 U.S.C. § 1982 and § 1983; and 42 U.S.C. § 1437.

Plaintiff, first being duly cautioned and sworn, states as follows:

(1) Plaintiff is a negro, and is now, and at all time relevant to the instant action, a resident of the City of Covington, (hereinafter City).

(2) Defendant, City, is a second class city in Kenton County, Ky. and during all periods relevant to the instant action, acted as a Public Housing Agency (PHA), as that term is defined in the United States Housing Act of 1937, as amended, 42 U.S.C. § 1437, etc. (hereinafter the Act).

(3) Defendant Howard Hodge is Director of Housing and as such overseers the City's Section 8 program.

(4) In November 1975, Plaintiff was contacted by Sharon Powell (hereinafter tenant), who had secured a certificate of participation in the Section 8 program.

(5) As a result the City tendered a lease agreement to plaintiff, whereby plaintiff was offering a three bedroom unit plaintiff had available at 309 Pleasant St. (second and third floor).

(6) Based upon H.U.D. guidelines, the family size necessitated three bedrooms.

(7) Acting pursuant to an Annual Contributions Contract with H.U.D. dated November 10, 1975, the City tendered a contract to plaintiff for his signature. (Ex. A)

(8) The amount of rent to be paid plaintiff was not set forth in the contract when it was tendered to plaintiff for his signature in the first week of December, 1975, (Ex. A), however, both the City and plaintiff understood that a reasonable rent for a three bedroom unit would be established pursuant to H.U.D. regulations.

(9) Based upon the family's income, the lease agreement provided that the tenant was not required to make any payments towards the rent, as the City assumed full responsibility for rent payments. (Ex. A)

(10) The contract also provided that, ". . . if the (tenant) continue(d) in occupancy, after the expiration of the term, on

the same terms and conditions as the original lease, the contract shall continue in effect for the duration of such tenancy, but in no case for a total term of more than five years."

(11) On December 8, 1975, Mr. Terry Hughes, City engineer, issued an "Inspection Report And Violation Notice" on the unit, wherein it alleged, inter alia, that the newly leased unit violated, the City's housing code (Ord. NO. 0-53-65) to the extent that the third floor thereof, needed a second means of egress (fire escape). (Ex. B)

(12) Plaintiff requested a hearing to review this decision, because he believed the City Engineer's determination was contrary to federal and state law, as the unit did not violate the National Building Code, Sec. 1707.2 para D. or any City Ordinance (particularly O-53-65)

(13) On January 19, 1976, upon review, Mr. Hughes issued a determination that he had in fact erred, and that the unit, ". . . (did) not fall within the requirements for a second means of egress (as provided in the National Building Code, Sect. 1707.2 para. D) at the present time on the second floor." (Ex. C).

(14) On February 5, 1976, shortly after Mr. Hughes issued his aforementioned determination, Mr. Condit, as City Manager, tendered an Ordinance O-9-76, to the City Commission, as special legislation, whereby the Fire Department, of the (City) recommended that an addition be made to the existing minimum standards for basis equipment facilities in relation to the exits from two family structures.

(15) Said ordinance was adopted upon the first reading, notwithstanding the fact, that said ordinance was contrary to state and federal law. (Ex. D)

(16) Based upon promulgation of City Ordinance (O-9-76), the City refused to pay plaintiff the rent due under the contract (Ex. A).

(17) City officials were well aware that H.U.D. regulations prohibited plaintiff from evicting the tenant.

(18) Mr. Condit was aware of Peoples Liberty's Bank impending wrongful foreclosure on real estate plaintiff owned, and used City Ordinance O-9-76 as a tool to deprive plaintiff

of the rent due under the contract, soley to injure plaintiff in his business and personal endeavors.

(19) The City did not apply the Ordinance (O-9-76) to withhold rent payments to similarly situated white lessors under the Section 8 program.

(20) Plaintiff complained to the H.U.D. area office (Louisville) that the City's enactment of special legislation (O-9-76) was a scheme designed to discriminate along racial lines in the administration of the Section 8 program.

(21) On June 10, 1976, without requiring plaintiffs to install a second means of egress, (fire escape) the City start paying the rent, but changed the date in the contract from December 1975 to June 10, 1976. (Ex. A).

(22) The City's act of changing the lease commencement date after plaintiff had signed the agreement was fraudulent and contradicted the parties understanding that the lease begin when plaintiff allowed the tenant to take possession of the unit, the first week of December, 1975.

(23) The City refused to provide plaintiff with justification for changing the lease date or give reason for the below market rent for a three bedroom unit.

(24) $140.00 was the maximum rent allowable for a one bedroom unit under the H.U.D. regulations then in effect.

(25) The City paid plaintiff $140.00 per month in rent from June 1976 until May 1977, while a fair and reasonable rent for the unit was $180.00.

(26) On May 10, 1977, Plaintiff and the City entered into a second lease agreement for $170.00 a month. (Ex. E).

(27) Under the lease, the tenant was required to pay $36.00 per month and the City was required to pay $134.00 per month. (Ex. E)

(28) The City refused to pay its share of the rent, ($134.00) and, in August 1977, filed criminal charges against plaintiff, alleging that plaintiff was operating a two family structure in violation of City Ordinance (O-9-76). (Ex. F-1, F-2).

(29) Under the lease agreement, plaintiff was required to furnish utilities for the tenant.

(30) Under H.U.D. regulations at the time, plaintiff could not evict the tenant.

(31) By withholding the rent due plaintiff, the City knowingly operated under an ordinance that Mr. Condit and other City Officials knew was null and void.

(32) The sole purpose of withholding the rent was to cause plaintiff business, personal and financial losses because of plaintiff's race.

(33) The tenant remained in the unit under the second lease agreement until about June 1981.

(34) On January 19, 1978, plaintiff filed a civil rights action styled Thompson v. Condit, et al. 78-05.

(35) This Court dismissed, without prejudice on June 30, 1981, affirmed 81-5573, Cert. Denied.

(36) On August 1, 1986, plaintiff filed a complaint in Kenton Circuit Court, alleging the same facts. (Thompson v. City of Covington and Howard Hodge (86-1266)

(37) Judge Hinton, Fleming Circuit Judge, was assigned to hear the case.

(38) On May 4, 1987, Judge Hinton entered two (2) findings of facts and conclusions of law. (Ex. G and H).

(39) On May 12, 1987, pursuant to CR 59, plaintiff moved the court to alter and/or amend the May 4, 1987 orders to conform to the proof in the case.

(40) Judge Hinton held hearings on the Rule 59 Motion on July 14, 1987, November 17, 1987 and March 28, 1988, but refused to rule on said motion.

(41) On June 15, 1988, plaintiff wrote Judge Hinton a letter requesting him to rule on plaintiff's Rule 59 Motion filed on May 12, 1987.

(42) On August 15, 1988, plaintiff filed a petition for writ of mandamus to compel Judge Hinton to rule on the Rule 59 motion.

(43) Said petition was denied by the Kentucky Court of

Appeals, (88-CA-1726), affirmed unpublished decision 88-SC-781, Cert. Denied November 13, 1989, NO. 89-505.

(44) Plaintiff is unable to get a ruling or decision in state Court, disposing of the case.

/s/ EDDIE THOMPSON, JR.

Subscribed and sworn to before me this 14th day of September 1990.

/s/ ISIAH SMITH, NOTARY
My Commission expires: 3/16/92

WHEREFORE, plaintiff pray:

(1) Declaratory Judgment declaring City Ordinance O-9-76 null and void.

(2) Rent from December 1975 thru May 76 @ $180.00 a month; $1,080.00.

(3) $40.00 a month from June 76 thru May 1977, $480.00.

(4) Rent from June 10, 1977 to July 81 @ $200.00; $9,800.00.

(5) Loss rent and profits; $20,000.00.

(6) Trial by jury.

(7) A reasonable attorney fee.

(8) All legal cost expended by plaintiff in this civil rights matter.

(9) Any other good and proper relief that plaintiff may be entitled.

/s/ EDDIE THOMPSON, JR., Pro
P.O. BOX 1221
COVINGTON, KY 41011
(606)-492-6278

[EXHIBITS OMITTED]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT COVINGTON

CIVIL ACTION NO. 90-162

EDDIE THOMPSON, JR.

PLAINTIFF

vs.

CITY OF COVINGTON,
HOWARD HODGE, AND JOSEPH CONDIT

DEFENDANTS

OPINION AND ORDER
(Filed December 18, 1990)

This matter is before the court on the motion to dismiss of the defendants on the ground that this action is barred by the Statute of Limitations and also by the doctrine of *res judicata*.

Because passing on the *res judicata* issue would involve time-consuming comparison of this case with previous actions filed by the plaintiff in this court, the court will limit its ruling to the Statute of Limitations issue.

Defendants argue that the suit should be dismissed because the applicable Statute of Limitations for tort actions is one year. Defendants maintain that the actions complained of are in the nature of tort actions, and that they all occurred more than one year ago. Defendants also contend that, as KRS 413.120 provides a general five year Statute of Limitations for other items covered by specific statutes, and that no action occurred more than five years ago, the suit is further barred.

Plaintiff contends that the statute has not run because the acts of defendants depriving plaintiff of rightful possession of his property have been continuous since 1979. Plaintiff appears to mean that the effect has been continuous. Plaintiff also contends that defendants' conduct has been fraudulent, and that they are, therefore, barred from asserting a Statute of Limitations.

Plaintiff appears to think that the nature of the action is basically to recover real property. Hence, he maintains that the Statute of Limitations for torts does not apply, and that the appropriate statute is fifteen years.

In *Owens* v. *Okure*, 109 S. Ct. 573 (1989), the Supreme Court held that the state law governing residual or general personal injury actions shall provide the Statute of Limitations for section 1983 actions. The Sixth Circuit recently eliminated any confusion regarding the applicable Kentucky statute. "[S]ection 1983 actions in Kentucky are limited by the one-year Statute of Limitations found in section 413.140(1)(a)." *Collard* v. *Kentucky Bd. of Nursing*, 896 F.2d 179, 182 (6th Cir. 1990). *See also Holbert* v. *West*, 730 F. Supp. 50, 52 N.1 (E.D. Ky. 1990); *Hambrick* v. *Davies*, 711 F. Supp. 884, 885-86 (E.D. Ky. 1989). The Statute of Limitations begins to run when the plaintiff knows or has reason to know of the injury which is the basis of his action. *Sevier* v. *Turner*, 742 F.2d 262, 273 (6th Cir. 1984).

Plaintiff's cause of action in this matter is barred by the one year Statute of Limitations. The actions that plaintiff principally complains of occurred from 1978-1982. Even the subsequent conveyances of the three parcels, which plaintiff maintains were effected in order to conceal the initial fraudulent foreclosure, occurred in the latest instance in 1988. (¶ 93 of Complaint).

Therefore, the court being advised,

IT IS ORDERED that the motion of defendants to dismiss be, and it is, hereby granted, and this matter will be dismissed, with prejudice by separate Judgment entered concurrently herewith, as barred by the Statute of Limitations. The court notes that most of the claims are probably also barred by *res judicata* as a reading of the plaintiff's complaint seems to involve the same allegations as previous claims of the plaintiff ruled on by the court at previous times.

This 18th day of December, 1990.

/s/ WILLIAM O. BERTELSMAN,
JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT COVINGTON

CIVIL ACTION NO. 90-162

EDDIE THOMPSON, JR.

PLAINTIFF

vs.

CITY OF COVINGTON,
HOWARD HODGE, AND JOSEPH CONDIT

DEFENDANTS

JUDGMENT
(Filed December 18, 1990)

Pursuant to the Opinion and Order of this court entered concurrently herewith,

IT IS ORDERED AND ADJUDGED that the within matter be, and it is, hereby dismissed, with prejudice, at the cost of the plaintiff.

This 18th day of December, 1990.

/s/ WILLIAM O. BERTELSMAN
JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT COVINGTON

CIVIL ACTION NO. 90-162

EDDIE THOMPSON, JR.
PLAINTIFF

vs.

CITY OF COVINGTON,
HOWARD HODGE, AND JOSEPH CONDIT
DEFENDANTS

ORDER
(Filed March 4, 1991)

This matter is before the court on the motions of plaintiff to vacate the Judgment, to grant the motion to strike; to make findings of facts; for a hearing; for an order that facts in request for admissions be taken as established; and motion of defendant Condit for protective order.

The court has carefully reviewed this record.

IT IS ORDERED as follows:

1. That the motion of plaintiff to vacate the Judgment of this court entered December 18, 1990, be, and it is, hereby denied;

2. That the motion of plaintiff for findings of fact be, and it is, hereby granted. A separate revised Opinion and Order shall enter concurrently herewith;

3. That the motion of plaintiff for a hearing be, and it is, hereby denied;

4. That the motion of plaintiff to strike be, and it is hereby denied;

5. That the motion of plaintiff for an order that facts in request for admissions be taken as established be, and it is, hereby denied;

6. That the motion of defendant Joseph Condit for a protective order be, and it is, hereby denied as moot.

This 4th day of March, 1991.

/s/ WILLIAM O. BERTELSMAN,
JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT COVINGTON

CIVIL ACTION NO. 90-162

EDDIE THOMPSON, JR.

PLAINTIFF

vs.

CITY OF COVINGTON,
HOWARD HODGE, AND JOSEPH CONDIT

DEFENDANTS

REVISED OPINION AND ORDER
(Filed March 4, 1991)

This matter is before the court on the motion to dismiss of the defendants on the ground that this action is barred by the Statute of Limitations and also by the doctrine of *res judicata*.

Because passing on the *res judicata* issue would involve time-consuming comparison of this case with previous actions filed by the plaintiff in this court, the court will limit its ruling to the Statute of Limitations issue.

Plaintiff contends that the basis of litigation was a written contract between plaintiff and the City of Covington, and that the fifteen year statute of limitations governing contracts should apply. However, plaintiff filed suit in federal court alleging violation of 42 U.S.C. § 1983. The applicable statute of limitations is one year. *Collard* v. *Kentucky Bd. of Nursing*, 896 F.2d 179, 182 (6th Cir. 1990).

Plaintiff charges that defendants deprived him of his civil rights by manipulating the conditions under which an apartment at 309 Pleasant Street, in Covington, owned by plaintiff, was leased to the City for participation in a subsidized housing program. The alleged manipulation, resulting in withholding of rent payments on the property, occurred be-

tween 1975 and 1977. Consequently, the action is barred by the statute of limitations.

The court notes that this case has been dismissed and the court is unwilling to put the defendants to the expense and inconvenience of attending any such hearing on plaintiff's motions.

IT IS SO ORDERED this 4th day of March, 1991.

/s/ WILLIAM O. BERTELSMAN,
JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

CASE NO. 90-162

EDDIE THOMPSON, JR.
PLAINTIFF

vs.

CITY OF COVINGTON,
HOWARD HODGE, JOSEPH CONDIT
DEFENDANTS

AFFIDAVIT

Come now Eddie Thompson, Jr., affiant herein, first being duly cautioned and sworn and state as follows;

(1) On October 9, 1990, [NR 2] Mr. McMurtry filed a motion to dismiss on behalf of defendants Hodge and Condit.

(2) On October 19, 1990, Mr. Charles filed an identical motion to dismiss on behalf of the City of Covington.

(3) Mr. Wagner did not file a copy of his motion to dismiss upon plaintiff.

(4) The City were technically in default when Mr. Wagner filed the Motion.

(5) The reason for the 2 motion was, Mr. McMurtry knew the applicable Kentucky statute of limitations had not run and he did not want to make that claim alone.

(6) On December 3, 1990, plaintiff filed a motion to strike the motions filed by Mr. McMurtry and Mr. Wagner as insufficient as a matter of law.

(7) Neither Mr. McMurtry or Mr. Wagner ever filed a response to the motion to strike or in any way dispute the fact that their motions were insufficient as a matter of law.

(8) Local Rule 6(b)(1)(B) suggest, "failure to file an op-

posing memorandum may be grounds for granting the motion."

(9) In response to plaintiff's motion to vacate, [NR 15] Mr. McMurtry could not state one fact to support dismissal based on the statute of limitations defense, but did wrongfully represent that this Court dismissed this case on the merit when it was here before. (78-05)

(10) In response to Plaintiff's motion to vacate, [NR 16] Mr. Wagner likewise could not state one fact to support dismissal based on the statute of limitations defense, but did wrongfully represent that this Court dismissed this case on the merit when it was here before. (78-05)

(11) On appeal defendants can not point to any reason at law for the Court's decision.

(12) Mr. McMurtry's motion for a protective order on January 16, 1991, [NR 17] was not well grounded in fact, was not warranted by existing law, nor in good faith.

(13) Mr. McMurtry's second motion for a protective order on February 20, 1991, [NR 20] (for case NO. 90-163) likewise was not well grounded in fact, was not warranted by existing law, was not in good faith and was done to cause unnecessary delay and needless increase the cost of litigation.

/s/ EDDIE THOMPSON, JR.

Subscribed and sworn to before me this 14 day of March, 1991.

My commission expires: 3/16/92

/s/ ISIAH SMITH,
NOTARY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT COVINGTON

CIVIL ACTION NO. 90-162

EDDIE THOMPSON, JR.

PLAINTIFF

vs.

CITY OF COVINGTON,
HOWARD HODGE, AND JOSEPH CONDIT

DEFENDANTS

ORDER
(Filed April 18, 1991)

This matter is before the court on the motion of plaintiff for reconsideration of this court's Order of March 4, 1991, and for sanctions pursuant to Fed.R.Civ.P. 11, and no response having been filed thereto, pursuant to Joint Local Rule 6(b), and the court being advised,

IT IS ORDERED that defendants file a response to such motions on or before APRIL 28, 1991.

This 18th day of April, 1991.

/s/ WILLIAM O. BERTELSMAN,
JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT COVINGTON

CIVIL ACTION NO. 90-162

EDDIE THOMPSON, JR.
PLAINTIFF

vs.

CITY OF COVINGTON,
HOWARD HODGE, AND JOSEPH CONDIT
DEFENDANTS

ORDER
(Filed June 6, 1991)

This matter is before the court on various motions of the plaintiff, and the court having reviewed the record herein, and being advised,

IT IS ORDERED as follows:

1. Plaintiff's motion to vacate of December 28, 1990, was denied by this court in its order of March 4, 1991, at which time the court made additional findings of fact. On March 14, 1991, plaintiff made a motion for reconsideration. The court having earlier denied the motion to vacate, the motion for reconsideration be, and it is, hereby denied as moot.

2. Plaintiff's motion for sanctions against defendants for their failure to properly answer requests for admissions be, and it is, hereby denied. Plaintiff made the request for admissions on Dec. 4, 1990. When the court dismissed the case on Dec. 18, 1990, the procedures of Fed.R.Civ.P. 36, under which requests for admissions may be deemed admitted if not denied, no longer applied. *See Graham* v. *3 Or More Members*, 556 F. supp. 669, 672 (S.D. Tex. 1983). Defendants were under no obligation to answer the requests. Rule 37(c) provides for an exemption from the imposition of sanc-

tions under such circumstances. Plaintiff has raised no grounds to impose sanctions pursuant to Rule 11. Accordingly, plaintiff's motion for sanctions in violation of Rule 11 be, and it is, hereby denied.

3. Plaintiff has filed a pleading under Fed.R.App.P. 10(c), "Plaintiff's Statement of Evidence and/or Proceedings." Defendants have filed Objections to this pleading. Under the Rule, the statement and objections are submitted to the district court for settlement and approval. The court notes that Rule 10(c) is inapplicable under the circumstances of this case, where no hearings or trial were held. The purpose of the rule is to preserve on the record any proceedings which were held but not recorded. *See* 9 Moore, Moore's Federal Practice, ¶ 210.06. No hearings or trial were held in this case; there is no shortcoming in the record for which the Rule can provide a remedy.

4. Mr. Thompson appears to be sincere in his belief that the law affords him relief for his unsuccessful real estate transactions in the 1970's. However, he has fully litigated these issues and is draining the resources of the court and the parties named as defendants.

The court can fashion remedies to handle this needless drain on its resources. *Filipas* v. *Lemons*, 835 F.2d 1145 (6th Cir. 1987); *Kersh* v. *Borden Chemical*, 689 F. Supp. 1442 (E.D. Mich. 1988). The remedy must be narrowly tailored to "protect the courts and innocent parties, while preserving the legitimate rights of litigants." *Farguson* v. *MBank Houston, N.A.*, 808 F.2d 358, 360 (5th Cir. 1986). In *Filipas*, the Sixth Circuit affirmed a district court which required leave of court before plaintiffs, who had filed many civil rights complaints concerning the same 1972 car accident, could file another complaint in the same matter. 835 F.2d at 1146. "This requirement is the proper method for handling the complaints of prolific litigators, and the process does not violate the first amendment." *Id.* Other circuits have affirmed orders requiring leave of court before the filing of additional pleadings. *See Matter of Packer Ave. Associates*, 884 F.2d 745, 747 (3rd Cir. 1989).

Accordingly, the court orders that plaintiff may not file any further pleadings or new actions dealing with issues raised in Covington Civil Action No. 90-162 without leave of this court. In seeking leave of court, plaintiff must certify that the claims he wishes to present are new claims, never before raised and disposed of on the merits by a federal court. Upon failure to certify or upon false certification, plaintiff may be found in contempt of court and punished accordingly.

This 6th day of June, 1991.

/s/ WILLIAM O. BERTELSMAN,
JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

CIVIL NO. 90-162

EDDIE THOMPSON, JR.

PLAINTIFF

vs.

CITY OF COVINGTON, ET AL.

DEFENDANTS

ORDER

(Filed July 23, 1991)

The matter before the Court being a Motion for leave to file a Motion to amend a Notice of Appeal on behalf of the above-named plaintiff, with said plaintiff having filed a Notice of Appeal in this case on April 1, 1991, and the Court having considered same, it is

ORDERED that this Court feels that said plaintiff wishes to raise certain other issues before the Sixth Circuit Court of Appeals, therefore, this Court is of the opinion that it lacks jurisdiction over said matter, and accordingly, declines to rule on same, with the direction to the plaintiff to raise this issue with the Sixth Circuit Court of Appeals.

This 23rd day of July, 1991.

/s/ WILLIAM O. BERTELSMAN,
JUDGE

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.
This notice is to be *prominently* displayed if this decision is reproduced.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUT

NO. 91-5590

EDDIE THOMPSON, JR.,
Plaintiff-Appellant,

v.

CITY OF COVINGTON;
HOWARD HODGE; JOSEPH CONDIT,
Defendants-Appellees.

ORDER
(Filed October 9, 1991)

BEFORE: JONES and NELSON, Circuit Judges, and JOINER, Senior District Judge.*

Eddie Thompson, Jr., a Kentucky citizen, appeals pro se from the judgment for defendants in this civil rights action. This case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

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* The Honorable Charles W. Joiner, U.S. Senior District Judge for the Eastern District of Michigan, sitting by designation.

Thompson brought this suit for money damages against the city of Covington, Kentucky, and two of its officials, alleging that they had conspired against him on the basis of his race in enacting an ordinance requiring him to add a fire escape to rental property he owned, in order to avoid paying rental assistance on behalf of one of his tenants. The acts complained of took place from December 1975 to August 1977. Thompson had filed a federal action based on these allegations in 1978, and a state court action also based on these facts in 1986. This complaint was filed on September 14, 1990. The defendants moved to dismiss the case on the grounds of the statute of limitations and res judicata. The district court granted the motion on statute of limitations grounds. The district court subsequently denied Thompson's motions for reconsideration and motion for sanctions, rejected his statement of the evidence purportedly filed pursuant to Fed. R. App. P. 10(c), and ordered that Thompson seek leave of court before filing any further pleadings or complaints arising out of these facts.

Upon consideration, we conclude that this case was properly dismissed as barred by the one year statute of limitations applicable to civil rights actions arising in Kentucky. *See Collard* v. *Kentucky Board of Nursing*, 896 F.2d 179, 182 (6th Cir. 1990). Thompson's arguments to the contrary are meritless. Thompson attempts to contest orders of the district court filed after the notice of appeal was filed in this case. His basis for raising these issues is questionable. *See Donlin* v. *Watkins*, 814 F.2d 273, 276 (6th Cir. 1987). Moreover, the arguments raised are without merit. Accordingly, the district court's judgment is affirmed. Rule 9(b)(3), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 91-5590

EDDIE THOMPSON, JR.,
Plaintiff-Appellant,

v.

CITY OF COVINGTON;
HOWARD HODGE; JOSEPH CONDIT
Defendants-Appellees.

ORDER

(Filed November 29, 1991)

BEFORE: JONES and NELSON, Circuit Judges, and JOINER, Senior District Judge.*

This pro se appellant has filed a petition for rehearing of this court's October 9, 1991, order affirming the district court's dismissal of his civil rights action.

After careful consideration, the panel concludes that it acted under no misapprehension of law or fact in issuing its order. Fed. R. App. P. 40(a).

Accordingly, it is ORDERED that the petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
Clerk

* The Honorable Charles W. Joiner, U.S. Senior District Judge for the Eastern District of Michigan, sitting by designation.